

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA, *et al. ex rel.* TOBY TRAVIS, §
Plaintiffs, § No. 17-cv-01183-CMR
§
v. §
§
GILEAD SCIENCES, INC., *et al.*, §
§
Defendants. §

**PLAINTIFF'S MOTION FOR LEAVE TO FILE FOURTH AMENDED
COMPLAINT TO DROP COUNT XXVI AND DISMISS THE STATE OF TEXAS**

Pursuant to Rule 15 of the Federal Rules of Civil Procedure and Local Rule 7.1, Plaintiff-Relator, Toby Travis (“Relator”), hereby moves the Court for leave to file a Fourth Amended Complaint (attached hereto as Exhibit “A”¹) to drop Count XXVI of the Third Amended Complaint (“TAC”) and dismiss the State of Texas without prejudice (“Motion”).

Defendant, Good Health, Inc. d/b/a Premier Pharmacy Services (“Premier”), does not object to this motion, and Defendant Gilead Sciences, Inc. (“Gilead,” collectively “Defendants”) has informed Relator that it will file papers setting forth its position with respect to this submission. Relator files this motion out of an abundance of caution, even though this motion is filed within the time period established in this Court’s July 18, 2022 Scheduling Order (ECF No. 89) (“Scheduling Order”), providing the parties with a deadline of this date² to add or drop claims or parties without leave of Court. Relator’s counsel have consulted with the State of

¹ Exhibit “B” contains a redline of the proposed Fourth Amended Complaint tracking all changes.

²The Scheduling Order actually establishes a deadline of September 18, 2022 but, pursuant to Fed.R.Civ.P. 6, the deadline is September 19, 2022, since September 18 is a Sunday.

Texas, which consents to this dismissal. In support of this motion, Relator incorporates herein his accompanying Memorandum of Law.

Dated: September 19, 2022

Respectfully submitted,

MILLER SHAH LLP

/s/ James C. Shah

James C. Shah (PA ID 80337)
Natalie Finkelman (PA ID 57197)
Bruce D. Parke (PA ID 89067)
John C. Roberts (PA ID 322416)
Alec J. Berin (PA ID 328071)
1845 Walnut Street, Suite 806
Philadelphia, PA 19103
Telephone: (610) 891-9880
Facsimile: (866) 300-7367
Email: jeshah@millershah.com
nfinkelman@millershah.com
bdparke@millershah.com
jcroberts@millershah.com
ajberin@millershah.com

James E. Miller (PA ID 64280)
Laurie Rubinow
65 Main Street
Chester, CT 06412
Telephone: (860) 526-1100
Facsimile: (866) 300-7367
Email: jemiller@millershah.com
lrubinow@millershah.com

Nathan C. Zipperian (PA ID 202585)
1625 N. Commerce Pkwy, Suite 320
Fort Lauderdale, FL 33326
Telephone: (866) 849-7545
Facsimile: (866) 300-7367
Email: nczipperian@millershah.com

YOUNMAN & CAPUTO
David J. Caputo (PA ID 79317)
2 Logan Square
100-120 N 18th Street, Suite 1925
Philadelphia, PA 19103
Telephone: (215) 302-1999
Email:

THE WEISER LAW FIRM P.C.
Christopher L. Nelson (PA ID 85609)
John J. Gross (PA ID 91687)
4 Tower Bridge
200 Barr Harbor Drive, Suite 400
West Conshohocken, PA 19428
Telephone: (610) 225-2677
Facsimile: (610) 408-8062

*Attorneys for Plaintiff-Relator Toby
Travis*

CERTIFICATE OF SERVICE

I certify that, on September 19, 2022, a copy of the foregoing document and the accompanying Memorandum of Law was served on all counsel of record through the Court's CM/ECF notification system and is available for viewing and downloading from the ECF system.

/s/ James C. Shah
James C. Shah

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**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S
MOTION TO FILE FOURTH AMENDED COMPLAINT TO DROP
COUNT XXVI AND DISMISS THE STATE OF TEXAS**

Pursuant to Federal Rule of Civil Procedure 15, Plaintiff-Relator Toby Travis ("Relator" or "Plaintiff") respectfully requests the Court grant his Motion to File a Fourth Amended Complaint to Drop Count XXVI and Dismiss the State of Texas ("Motion").³ Through the Fourth Amended Complaint, Relator seeks to drop Count XXVI of the Third Amended Complaint ("TAC"), thereby effectively dismissing the State of Texas from the action. Doing so will serve purposes of judicial economy and efficiency as discussed herein, and will not prejudice Defendants Good Health, Inc. d/b/a Premier Pharmacy Services ("Premier") or Gilead Sciences, Inc. ("Gilead," and, with Premier, "Defendants") in any material way.

INTRODUCTION AND BACKGROUND

Gilead is currently a defendant in a Texas state court action (the "Texas Action") alleging violations of the Texas Medicaid Fraud Prevention Act ("TMFPA"). On September 30, 2021 the Court of Appeals, Sixth Appellate District of Texas at Texarkana stayed that action after

³The dismissal of the Texas from this matter is made with no regard to the merits of the claims asserted in this action or in the Texas Action, and no such inferences should accordingly be inferred.

determining that the Texas Action's allegations were sufficiently similar to the allegations in this case.⁴ Counsel for the relators in the Texas Action, with the express consent of the Texas Attorney General's Office, have requested Relator Travis dismiss his TMFPA claim against Gilead so that the Texas Action may proceed. In light of the States of Texas' consent to the dismissal of the claims asserted on behalf of Texas in this action, and to facilitate the interests of judicial economy and efficiency, Relator has agreed to drop Count XXVI from the TAC, thus dismissing the State of Texas as a party plaintiff and allowing the action in Texas state court to proceed.

PROCEDURAL HISTORY

Relator filed the TAC in this action on July 14, 2021 (ECF No. 49). Defendants moved to dismiss the TAC pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6) on August 13, 2021 (ECF No. 56). The Court granted in part and denied in part Defendants' Motion to Dismiss on March 31, 2022 (ECF No. 66). Gilead answered Relator's TAC on May 23, 2022 (ECF No. 73). Premier answered the TAC on June 16, 2022 (ECF No. 74).

The Court entered a Scheduling Order on July 18, 2022 (ECF No. 89). In that Order, the Court specified that the parties would have until September 18, 2022 to add or drop claims or parties "without leave of Court, as further discussed in the July 18, 2022 Rule 16 conference." *Id.* Although the Court's Order expressly grants leave to Relator to amend without leave, Relator's counsel understood from the Court's remarks at the scheduling conference held on July 18, 2022 that the Court had the expectation that a motion would be filed on this issue. Accordingly, out of an abundance of caution, Relator seeks leave and submits this Motion and Memorandum for the Court's review and consideration.

⁴ *In re Gilead Sciences, Inc.*, 2021 WL 4466006 (Tex. App. – Texarkana 2021).

ARGUMENT

Federal Rule of Civil Procedure 15 instructs that “a party may amend its pleading [with] the court’s leave,” which the court “should freely give [] when justice so requires.” Fed. R. Civ. P. 15(a)(2); *see also Arthur v. Maersk, Inc.*, 434 F.3d 196, 204 (3d Cir. 2006) (“Leave to amend must generally be granted unless equitable considerations render it otherwise unjust.”). It is well-settled that “grant of leave to amend the pleadings pursuant to Rule 15(a) is within the discretion of the trial court.” *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971); *see also Cureton v. Nat'l Collegiate Athletic Ass'n*, 252 F.3d 267, 272 (3d Cir. 2001) (“[A] motion for leave to amend a complaint [is] addressed to the sound discretion of the district court.”). “In exercising its discretion to grant or deny leave to amend, a district court should be guided by the underlying purpose of allowing amendments to facilitate a decision on the merits.” *Fed. Trade Comm'n v. Am. Future Sys., Inc.*, 2021 WL 199612, at *3 (E.D. Pa. Jan. 20, 2021) (internal quotations and citation omitted).

Allowing Relator to file a Fourth Amended Complaint would serve justice, promote judicial efficiency, and would not result in undue prejudice, delay, or futility. *See Lorenz v. CSX Corp.*, 1 F.3d 1406, 1414 (3d Cir. 1993) (“Prejudice to the non-moving party is the touchstone for the denial of an amendment.”); *Heyl & Patterson Int'l, Inc. v. F.D. Rich Hous. of the V.I., Inc.*, 663 F.2d 419, 425 (3d Cir. 1981) (“In the absence of substantial or undue prejudice, denial must be grounded in bad faith or dilatory motives, truly undue or unexplained delay, repeated failure to cure deficiency by amendments previously allowed or futility of amendment.”).

Here, the amendment Relator requests is minimal. Relator seeks to file a Fourth Amended Complaint for the sole purpose of dropping Count XXVI of the Third Amended Complaint, effectively dismissing the State of Texas without prejudice from the action. The

dismissal of the TMFPA claims will allow those claims to proceed unencumbered in Texas.

Accordingly, Relator seeks to make no other changes to the pleadings than to drop Count XXVI.

Relator is confident that counsel in the Texas Action will fully and fairly prosecute the State's claims against Gilead and the State of Texas has consented to this dismissal.

Given the permissive standard under Rule 15(a), "the burden is on the party opposing the amendment to show prejudice, bad faith, undue delay, or futility." *Chancellor v. Pottsgrove Sch. Dist.*, 501 F. Supp. 2d 695, 700 (E.D. Pa. 2007). Granting Relator's Motion would not cause undue prejudice to Gilead, as it would not "result in additional discovery, cost, and preparation to defend against new facts or theories." *Cureton*, 252 F.3d at 272. In addition, the parties are at the early stages of fact discovery, there are many months remaining in the discovery period for this action, and Gilead has yet to respond to Relator's discovery requests. *See* Scheduling Order (ECF No. 89) (setting the fact discovery deadline as July 18, 2023); *Jacovetti Law, P.C. v. Shelton*, 2020 WL 1984883, at *1 (E.D. Pa. Apr 27, 2020) ("Here, [defendant] does not allege undue delay or prejudice, nor could he, given the early stage of the litigation."). Moreover, Premier has consented to the dismissal. Finally, granting Relator's Motion would also not result in any undue delay in the resolution of this action. Relator is not requesting any change to the Scheduling Order, nor is there any reason why dropping Count XXVI would require such a change.

CONCLUSION

For all the foregoing reasons, Relator respectfully requests that the Court grant leave to file the attached Fourth Amended Complaint. A proposed Order granting the requested relief accompanies this submission.

Dated: September 19, 2022

Respectfully submitted,

MILLER SHAH LLP

/s/ James C. Shah

James C. Shah (PA ID 80337)
Natalie Finkelman (PA ID 57197)
Bruce D. Parke (PA ID 89067)
John C. Roberts (PA ID 322416)
Alec J. Berin (PA ID 328071)
1845 Walnut Street, Suite 806
Philadelphia, PA 19103
Telephone: (610) 891-9880
Facsimile: (866) 300-7367

James E. Miller (PA ID 64280)
65 Main Street
Chester, CT 06412
Telephone: (860) 526-1100
Facsimile: (866) 300-7367

Nathan C. Zipperian (PA ID 202585)
1625 N. Commerce Pkwy, Suite 320
Fort Lauderdale, FL 33326
Telephone: (866) 849-7545
Facsimile: (866) 300-7367

YOUNMAN & CAPUTO
David J. Caputo (PA ID 79317)
2 Logan Square
100-120 N 18th Street, Suite 1925
Philadelphia, PA 19103
Telephone: (215) 302-1999

THE WEISER LAW FIRM P.C.
Christopher L. Nelson (PA ID 85609)
John J. Gross (PA ID 91687)
4 Tower Bridge
200 Barr Harbor Drive, Suite 400
West Conshohocken, PA 19428
Telephone: (610) 225-2677
Facsimile: (610) 408-8062

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[PROPOSED] ORDER

AND NOW, on this _____, 2022, upon consideration of Relator's Motion for Leave to File Fourth Amended Complaint to Drop Count XXVI and Dismiss the State of Texas without prejudice, and Defendant's response thereto, it is hereby ORDERED that Relator's Motion is GRANTED. The Clerk is directed to file the Fourth Amended Complaint, attached as Exhibit A to Relator's Motion, and remove the State of Texas as party plaintiff on the docket for the above-captioned matter.

Honorable Cynthia M. Rufe
United States District Judge